Maju Holdings Sdn Bhd v Fortune Wealth (H-K) Ltd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NO W–02–965 OF 2001, W–02–964 OF 2001 AND W–02–90 OF 2001
ABDUL KADIR SULAIMAN, HASHIM YUSOFF AND TENGKU BAHARUDIN SHAH JJCA
25 SEPTEMBER 2004

Civil Procedure — Appeal — Application to produce new evidence — Adducing fresh evidence — Whether requirements in Ladd v Marshall satisfied — Rules of the Court of Appeal 1994 r 7(3A) — Courts of Judicature Act 1964 s 69(3)

Companies and Corporations — Shares — Option to purchase shares — Call and put option agreement — Whether respondent could enforce call and put option ageement — Whether appellant had to honour its obligations under the agreement

The appellant and the respondent entered into a call and put option agreement dated 21 April 1997 ('the agreement'). Under the terms of the agreement the respondent had granted to the appellant during the call option period, the call option to require the respondent to sell and/or cause or procure the sale by the respondent to the appellant of 1,646,000 shares in Ipmuda Bhd, free from all restrictions and all other encumbrances at the completion date at the option price of RM7.55 per share. The call option action may be exercised by the appellant by serving an exercise notice on the respondent during the call option period defined in the agreement which is a period of 12 months from the date of the agreement. Under the terms of the agreement the appellant had also granted to the respondent during the put option period, the put option to require the appellant to purchase and/or cause the purchase by the appellant the 1,646,000 shares in Ipmuda Bhd free from all restrictions and all other encumbrances at the completion date at the option price of RM7.55 per share. As in the agreement the put option may be exercised by serving an exercise notice on the appellant during the put option period, a period of 7 days commencing from the date of expiration of the call option period. The appellant did not exercise the call option when the call option period expired on 20 April 1998. The respondent then exercised its put option on 27 April 1998 by serving an exercise notice on the appellant requiring the appellant to purchase the 1,646,000 shares in Ipmuda Bhd at the price of RM12,427,300 based on RM7.55 per share. The appellant did not respond to this exercise notice issued by the respondent. The respondent's solicitors then served a letter of demand dated 13 May 1998 upon the appellant demanding that the appellant purchase or cause to purchase the option shares at the total option price of RM12,427,300. The appellant again failed to respond to the respondent's solicitors' letter of demand. The respondent had also by letter dated 16 April 1999 addressed for the attention of Tan Sri Abu Sahid bin Mohamed, the Executive Chairman of the appellant and notified the appellant that it will proceed to force sell the options shares if no objections were received in writing from the appellant within 24 hours. Again the appellant did not respond. Subsequently the respondent's solicitors had by letter dated

9 November 2000 furnished the appellant's solicitors with an account of the force selling of the option shares. The appellant's solicitors did not respond to this letter. The respondent then instituted legal proceedings against the appellant claiming various reliefs. After a full trial the trial judge entered judgment in favour of the respondent. The appellant's counterclaim was dismissed with costs. The appellant appealed and applied to have fresh evidence adduced during the hearing of the appeal.

Held, dismissing the appeal with costs:

(1) The judgment under appeal did not contain any misdirection or errors warranting appellate interference. The learned judge had properly evaluated the whole body of evidence adduced at the trial and had drawn proper inferences of fact wholly consistent with the contemporary documentary evidence adduced in the case. The learned judge had come to correct findings of fact on the issues before him and had done all that was required of him by law. There were no merits in the appellant's appeals (see para 23).

(2) The appellant had benefited from the call and put option agreement entered into with the respondent. In these circumstances, it would be wholly unjust and unconscionable for the appellant not to honour its obligations to purchase the options shares under the agreement. The parties must honour their commercial bargain entered into (see para 25).

(3) The appellant's application to adduce fresh evidence through the affidavit of Tan Sri Abu Said bin Mohamed did not meet the first condition that it must be shown that the fresh evidence intended to be adduced at the appeal could not have been obtained with reasonable diligence for use at the trial. There are three conditions which must be fulfilled by the appellant in order for fresh evidence to be admissible at the appellate stage. They are cumulative and conjunctive and not disjunctive in that all the conditions must be fulfilled in order for the fresh evidence to be admissible at the hearing of the appeals in the Court of Appeal (see paras 13-15).

[**Bahasa Malaysia Summary**

Perayu dan responden telah memasuki satu perjanjian opsyen 'call and put' ('perjanjian tersebut') bertarikh 21 April 1997. Di bawah terma-terma perjanian tersebut, responden telah memberikan perayu semasa tempoh 'call' opsyen, opsyen 'call' untuk meminta responden menjual dan/atau mengusahakan penjualan kepada perayu oleh responden 1,646,000 syer dalam Ipmuda Bhd, bebas daripada apa-apa halangan dan bebanan pada tarikh penyelesaian pada harga opsyen RM7.55 satu syer. Tindakan opsyen 'call' boleh digunakan oleh perayu dengan menyampaikan notis pada responden dalam tempoh masa opsyen yang ditafsirkan dalam perjanjian tersebut iaitu 12 bulan dari tarikh perjanjian tersebut. Di bawah terma-terma perjanian tersebut juga perayu telah membenarkan responden semasa tempoh opsyen 'put', opsyen 'put' untuk meminta perayu membeli dan/atau mengusahakan pembelian oleh

perayu 1,646,000 syer dalam Ipmuda Bhd bebas daripada apa-apa halangan dan bebanan pada tarikh penyelesaian pada harga opsyen RM7.55 satu syer. Seperti yang diperuntukkan dalam perjanjian tersebut, opsyen 'put' boleh digunakan oleh responden dengan menyampaikan notis pada perayu semasa tempoh opsyen 'put' iaitu dalam jangka masa 7 hari bermula dari tarikh luput tempoh opsyen 'call'. Perayu tidak mengunakan opsyen 'call' apabila tempoh opsyen 'call' berakhir pada 20 April 1998. Responden telah mengunakan opsyen 'put' pada 27 April 1998 dengan menyampaikan notis kepada perayu meminta perayu membeli 1,646,000 syer dalam Ipmuda Bhd pada harga RM12,427,300 berdasarkan harga RM7.55 satu syer. Perayu tidak membalas notis yang dikeluarkan oleh responden. Peguamcara responden seterusnya telah menyampaikan surat tuntutan bertarikh 13 Mei 1998 pada perayu meminta perayu membeli atau menyebabkan pembelian syer opsyen pada harga RM12,427,300. Perayu sekali lagi tidak membalas surat peguamcara responden. Pihak responden juga melalui surat bertarikh 16 April 1999 kepada Tan Sri Abu Sahid bin Mohamed, Ketua Pengerusi perayu, memberitahu perayu bahawa mereka akan memaksa penjualan syer jika tiada apa-apa bantahan bertulis diterima daripada perayu dalam masa 24 jam. Sekali lagi perayu tidak membalas. Seterusnya peguam responden telah melalui surat bertarikh 9November 2000 memberi peguam perayu catatan akaun pembelian paksaan syer. Peguam perayu tidak membalas kepada surat itu. Responden kemudian telah memulakan prosiding undang-undang terhadap perayu memohon beberapa relif. Selepas perbicaraan penuh, hakim perbicaraan telah memasukkan penghakiman bagi pihak responden. Tuntutan balas perayu telah ditolak dengan kos. Perayu seterusnya merayu dan memohon supaya keterangan baru dikemukakan di dalam rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Penghakiman yang dirayu tidak mengandungi apa-apa ketidakadilan or kesalahan yang mewajarkan campur tangan rayuan. Hakim yang arif telah menilai dengan betul semua keterangan yang dikemukakan dalam perbicaraan dan telah membuat inferens fakta yang betul daripada keterarangan dokumen-dokumen kontemporari yang dikemukakan dalam kes ini. Hakim yang arif telah membuat keputusan fakta yang betul dan tepat mengenai isu-isu di hadapan beliau dan telah bertindak dengan betul dan secukupnya di sisi-sisi undang-undang. Tiada apa-apa merit dalam rayuan perayu (lihat perenggan 23).

(2) Perayu telah mendapat manfaat daripada perjanjian opsyen 'call and put' yang dimasuki dengan responden. Oleh itu adalah tidak adil dan tidak berpatutan bagi perayu untuk mengingkari obligasinya untuk membeli syer di bawah perjanjian tersebut. Semua pihak mesti menepati obligasi mereka (lihat perenggan 25).

(3) Permohonan perayu untuk mengemukakan keterangan baru melalui afidavit Tan Sri Abu Said bin Mohamed tidak memenuhi syarat pertama, iaitu untuk menunjukan bahawa keterangan baru yang hendak dikemukakan pada rayuan tidak boleh didapatkan dengan ketekunan yang munasabah untuk dikemukakan di perbicaraan. Terdapat tiga syarat yang mesti

dipenuhi oleh perayu untuk membolehkan keterangan baru dikemukakan pada rayuan. Ketiga-tiga syarat tersebut adalah kumulatif dan penghubung dan bukan penyarak, iaitu semua syarat mesti dipenuhi bagi membolehkan keterangan baru diterima pada perbicaraan rayuan-rayuan di Mahkamah Rayuan (lihat perenggan 13-15)].

Notes

For Option to purchase shares, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 750.
For application to produce new evidence, see 2(3) *Mallal's Digest* (4th Ed, 2001 Reissue) para 628.
For shares see 13 *Halsbury's Laws of Malaysia* paras [230.173]–[230.210]
For appeals see 1 *Halsbury's Laws of Malaysia* paras [10.11-001]–[10.11-054]

Cases referred to

Fortune Wealth (Hong Kong) Limited v Maju Holdings Sdn Bhd [2002] 3 CLJ 329
Lau Foo Sun v Government of Malaysia [1970] 2 MLJ 70 (folld)
Ladd v Marshall [1954] 3 All ER 745 (folld)
Lam Soon Cannery Co v Hooper & Co [1965] 2 MLJ 148 (refd)
Ing Merchant Bank (Singapore) Ltd & Anor v Dato' Mohamed Anuar bin Embong [2001] 4 MLJ 461 (refd)
Luaggage Distributors (M) Sdn Bhd. v. Tan Hor Teng & Ors [1995] 1 MLJ 719 (refd)
Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd [1993] 1 MLJ 113 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 69(3)
Rules of the Court of Appeal 1994 r 7(3A)

David Morais with Khabir Dhillon (Mohamad Illiayas & Co) for the Appellant
V. Sithambaram, VK Lakshmi (VK Lingam & Co) for the Respondent

Abdul Kadir Sulaiman JCA (delivering judgment of the court):

The Appeals

[1] All these three appeals, Civil Appeal Nos. W–02–965–2001, W–02–964–2001 and W–02–90–2001 came up for hearing before us on 13 October 2003. With the consent of the parties it was decided that Civil Appeal No. W–02–965–2001 should be heard first and the decision in this appeal shall be binding upon the other two appeals. This course was taken because the issues in both the appeals No. W–02–965–2001 and W–02–964–2001 have common features and raised common issues and also had identical pleadings. The issues raised in Civil Appeal No. W–02–90–2001 has also been raised in the other two appeals. A similar position was also taken in the High Court below where both cases were consolidated and it was decided that the decision in one case will bind the other case.

[2] These three appeals before us have a historical significance. This panel of the Court of Appeal was the first panel constituted to sit in the new premises of the Court of Appeal in the Palace of Justice in Putrajaya. Hence these three appeals were the first substantive appeals to be heard before us. We had on 16 October 2003 dismissed all these three appeals with costs and we now give our reasons for doing so.

[3] The material facts leading to these appeals before us had been marshalled with clarity by the trial judge in his judgment which has been reported as *Fortune Wealth (Hong Kong) Limited v Maju Holdings Sdn Bhd* [2002] 3 CLJ 329. In order to avoid wholesale repetition we will only refer to the brief facts of the case.

Brief Facts

[4] The appellant and the respondent entered into a call and put option agreement dated 21 April 1997. Under the terms of this agreement the respondent had granted to the appellant during the call option period, the call option to require the respondent to sell and/or cause or procure the sale by the respondent to the appellant of 1,646,000 shares in Ipmuda Bhd free from all restrictions and all other encumbrances at the completion date at the option price of RM7.55 per share. The call option action may be exercised by the appellant by serving an exercise notice on the respondent during the call option period defined in the agreement which is a period of 12 months from the date of the agreement.

[5] Under the terms of the agreement the appellant had also granted to the respondent during the put option period, the put option to require the appellant to purchase and/or cause the purchase by the appellant the 1,646,000 shares in Ipmuda Bhd free from all restrictions and all other encumbrances at the completion date at the option price of RM7.55 per share. As provided for in the agreement the put option may be exercised by the respondent by serving an exercise notice on the appellant during the put option period which is a period of seven days commencing from the date of expiration of the call option period.

[6] It is common ground that the appellant did not exercise the call option to purchase the 1,646,000 shares in Ipmuda Bhd when the call option period of 12 months had expired on 20 April 1998. The respondent then exercised its put option on 27 April 1998 by serving an exercise notice on the appellant requiring the appellant to purchase the 1,646,000 shares in Ipmuda Bhd at the total option price of RM12,427,300 based on the price of RM7.55 per share.

[7] The respondent's exercise notice was dated 27 April 1997 and it was duly served and acknowledged by the appellant at 5.35pm under the hand of Suzanna Abdul Rahman. This exercise notice made reference to the agreement dated 21 April 1997. The appellant did not respond at all to this exercise notice issued by the respondent. The respondent's solicitors then proceeded to serve a letter of demand dated 13 May 1998 upon the appellant

demanding that the appellant purchase or cause to purchase the option shares at the total option price of RM12,427,300. This letter of demand also made reference to the agreement dated 21 April 1997. The appellant again failed to respond to the respondent's solicitors' letter of demand.

[8] The respondent had also by letter dated 16 April 1999 addressed for the attention of Tan Sri Abu Sahid bin Mohamed, the Executive Chairman of the appellant and notified the appellant that it will proceed to force sell the options shares if no objections was received in writing from the appellant within 24 hours. Again the appellant did not respond. Subsequently the respondent's solicitors had by letter dated 9 November 2000 furnished the appellant's solicitors with an account of the force selling of the option shares. The appellant's solicitors did not again respond to this letter. The respondent then instituted legal proceedings against the appellant claiming various reliefs.

[9] It is clear to us that all the above letters made clear and unmistakable reference to the agreement dated 21 April 1997 and the appellant did not respond at all or challenge or dispute the respondent's reliance and claims made upon the agreement dated 21 April 1997.

[10] After a full trial the trial judge entered judgment in favour of the respondent for the sum of RM10,138,441.35 with interest thereon at the rate of 8%pa with effect from 28 April 1998 to the date of realisation and costs. The appellant's counterclaim was dismissed with costs. The appellant then appealed to this court.

Motions to Adduce Fresh Evidence.

[11] We had on 16 October 2003 dismissed the appellant's two notices of motion to adduce fresh evidence at the hearing of these appeals. These notices of motion were filed by the appellant after the appellant's counsel had completed his opening submission and the respondent's counsel was in the process of completing his submission in reply.

[12] In the notices of motion, the appellant had prayed for an order that the affidavit of Tan Sri Abu Said bin Mohammed affirmed on 15 October 2003 including all exhibits annexed to his affidavit be admitted as fresh evidence at the hearing of the appeals before us.

[13] We had after hearing both the appellant's counsel and the respondent's counsel dismissed both notices of motion with costs. We now give our reasons for doing so. We formed the view that the appellant's application to adduce fresh evidence through the affidavit of Tan Sri Abu Said bin Mohammed did not meet the first condition that it must be shown that the fresh evidence intended to be adduced at the appeal could not have been obtained with reasonable diligence for use at the trial.

[14] It is trite law that there are three conditions which must be fulfilled by the appellant in order for fresh evidence to be admissible at the appellate stage. The test was succinctly formulated by Suffian FJ (as he then was) in *Lau Foo Sun v Government of Malaysia* [1970] 2 MLJ 70 in the following terms:

This is an application for an order that the plaintiff/appellant be at liberty upon the hearing of his appeal to adduce further evidence.

To justify the reception of this evidence 'three conditions must be fulfilled:

First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

Second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive;

Third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently creditable, although it need not be incontrovertible.'

These were the tests enunciated by Denning LJ (as he then was) at p 748 in *Ladd v Marshall* [1954] 3 All ER 745.

[15] The said three conditions are cumulative and conjunctive and not disjunctive in that all the conditions must be fulfilled in order for the fresh evidence to be admissible at the hearing of the appeals in the Court of Appeal. The three conditions were also referred to by Thomson LP in *Lam Soon Cannery Co v Hooper & Co* [1965] 2 MLJ 148 at p 148:

> It is common ground that applications of this sort are regarded by this Court with considerable circumspection and the principles that have been applied in relation to them are stated as follows by Lord Denning in the case of Ladd v Marshall [1954] 1 WLR 1489 at p 1491:-
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> 'To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed or in other words, it must be apparently credible, though it need not be incontrovertible.'
>
> I pause to observe that these conditions are not alternative; they are cumulative.

See also the judgment of the Court of Appeal in *Ing Merchant Bank (Singapore) Ltd & Anor v Dato' Mohamed Anuar bin Embong* [2001] 4 MLJ 461.

[16] Section 69(3) of the Courts of Judicature Act 1964 similarly states that further evidence can be admitted on special grounds only with the leave of the Court of Appeal. The tests formulated in *Ladd v Marshall* [1954] 3 All ER 745 is also enunciated in r 7(3A) of the Rules of the Court of Appeal 1994.

[17] It is also an essential requirement that an application to admit fresh evidence must be supported by an affidavit which should explain fully why the evidence was not called in the court below and why it could not by the exercise of reasonable diligence have been obtained for use at the trial. This requirement is clearly stated in the *English Supreme Court Practice* (1997 Vol 1) at p 1004 as follows:

> 59/10/14 Mode of application for leave to adduce further evidence ...
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> ... The Application must be supported by an affidavit deposing to the facts relied upon in support of the application. In particular the affidavit should explain fully

why the evidence was not called in the court below, and where the *Ladd v Marshall* criteria apply, why it could not, by the exercise of reasonable diligence, have been obtained for use at the trial ...

[18] We found that the supporting affidavit affirmed by Tan Sri Abu Said bin Mohammed did not contain these relevant facts to fulfill the requirements for the admission of fresh evidence. In this particular case before us we were of the view that the appellant had failed to satisfy the first test as laid out in *Ladd v Marshall*. We came to the conclusion that had the appellant exercised reasonable diligence the fresh evidence now sought to be adduced at the hearing of these appeals could have been obtained from the witnesses concerned at the trial of this action in the High Court below. We found that there was no merit whatsoever in the appellant's application to adduce the fresh evidence and we had accordingly dismissed the appellant's application with costs.

[19] We now turn to the substantive appeals. The appellant's counsel had raised two main grounds in the appeals before us. These were also the very same grounds raised by the appellant in the High Court below. The first is the dating of the agreement. The appellant submitted that when the agreement was executed by the appellant under the seal of the appellant company it was blank as to the material particulars and the particulars were entered by the respondent without the consent or acknowledgement of the appellant. It was intended by both parties that the agreement was to come into force on 1 April 1997 and it is immaterial that the agreement was dated 21 April 1997. The appellant also alleged that the date in the agreement was fraudulently altered by the respondent from 1 April 1997 to 21 April 1997. The second ground advanced is that the respondent was not the beneficial owner of the option shares at the material time. The beneficial owner was said to be one Koh Kim Teck who was an agent of the appellant. The respondent was therefore in breach of the fundamental term of the agreement.

[20] In our judgment this appeal turns upon pure questions of fact based upon the evidence and the credibility of witnesses who gave their evidence at the trial together with the contemporary documentary evidence. The trial judge had correctly addressed himself by stating that 'in making a decision on this case, there is not much law involved but only hard facts are required'. The trial judge had after very carefully evaluating the evidence of the witnesses and the contemporaneous documentary evidence came to a finding of fact that the agreement was in fact dated 21 April 1997 and not 1 April 1997 as alleged by the appellant. The trial judge also held that there was no evidence of any fraudulent alteration of the date in the agreement. This is what the trial judge had to say at pp 12–14 of his judgment:

I have even at the close of this trial found no evidence of any such fraudulent alteration as alleged; nor was there produced to Court any other supporting document to the contrary by the Defendants, and took the stand not to refer P3 on the allegation to the Jabatan Kimia for their opinion; as I could then make an independent finding of fact on the evidence before me of DW3 Christopher Chew to the effect that when he returned the documents to the office of Mr Koh Kim Teck, they were then in blank and also after taking into consideration the evidence more particularly, the

A evidence of PW2 Mr Phang Ah Hee an advocate & solicitor who gave an unchallenged evidence to the effect that P3 was signed at his office on 21 April 1997 and he thereafter attesting and dating the document. In making a decision on this case; there is not much law involved but only hard facts are required; more particularly whether the said agreement — P3 was in fact dated on 21 April 1997 or 1 April 1997. The defendant's solicitor Mr David Morais at the hearing on 4 December 2000 in
B the making of an application, for the appointment of a Government Chemist to be appointed as a court expert under O 40 of the Rules of the High Court rightly said. 'If the call option was dated 1 April 1997 as the defendants contend and not as 21April 1997 as the plaintiffs contend; then the issue is resolved and we don't have to go into other issues. This issue can be decided summarily.

C From the pleadings, the statement of claim; the counter claim and the reply and upon the evidence led by PW1 and PW2, the plaintiff's case is established in that the said agreement was in fact dated 21 April 1997 and not 1 April 1997 as alleged by the defendants witnesses DW5 En Mohd Fauzi Yon; and DW6 En Hamidi Abdullah who were expressing hearsay evidence. The defendants had failed to produce to this court any documentary evidence not a single document in support
D to show that they have a document with them which is dated 1 April 1997 for comparison. In fact DW3 Mr. Christopher Chew — the director who was personally responsible in obtaining the agreements from the office of Mr. Koh Kim Teck and seeing to their execution and sealing by the Directors of the Defendant company; and subsequently returning them to the office of Mr Koh had said, that the agreements when he returned to Mr Koh's office were never dated with the date 1April 1997. 'The dates on the agreements were left blank. I am sure about that'
E With that evidence on record, I find as a fact that the agreement was in fact dated 21 April 1997; and not as 1 April 1997; and with that; the case is summarily decided on the main issue. The law of evidence is quite clear under s 103 of the Evidence Act 1950; that he who asserts must prove that fact; and that onus was on the defendants; which they had failed to do so. In the case of Anderson v Weston [1840] 6 Bing. NC 296 it was held that when a deed is produced (as P3 in this
F case under the Defendant's seal) and the execution of the deed (P3) is proved by the subscribing witness (in this case by PW2 — an advocate & solicitor of the High Court KL affirming on Oath his having affixed his signature on 21/4/1997 immediately upon PW1 representative of the plaintiff had signed in his presence) the signature; and that deed bears a date … that date has uniformly been taken to
G be prima facie evidence that the deed (P3 in this case) was executed at the time when it purports to bear the date.

[21] The judge also came to a finding of fact that the respondent was at the material time the beneficial owner of the options shares. The judge dealt with this issue in the following terms at pp 15 to 17 of his judgment:

H The defendants in their amended defence and the counterclaim alleged that the plaintiffs were not at the material time the beneficial shareholders of the Ipmuda Shares. One just has to read cl (2) of the Recital (P3) which reads 'the grantor is the beneficial owner of the number of ordinary shares ... as set out in the Schedule one; which schedule item 2 shows 1,646,000'. The Court of Appeal (per Justice Dato' Sri Ram JCA) in the case of *Luggage Distributors (M) Sdn Bhd. v Tan Hor Teng & Ors*
I [1995] 1 MLJ 719 at pp 746 and 747 said, 'it is a cardinal rule in the interpretations of contracts that recitals may be taken into account as an aid to construction ... the court may construe a recital as carrying with it an obligation to carry into effect that which is recited'.

Further the annual report of Ipmuda Bhd was presented to the Ipmuda Board through its Executive Chairman Tan Sri Abu Sahid; who also happens to be the Executive Chairman of the defendant company; and there said 'on behalf of the Board of Directors, I am pleased to present this annual report for the year ended 31/12/1998'. At p 14 of the said annual report (please see exh P12) items (15) and (16) at p 12 carries the name of the plaintiff (Fortune Wealth Hong Kong Ltd) as having a direct shareholding of 1,646,000 shares and by Item (16) the Regalion Investment Ltd (the plaintiffs in Civil Suit D6-22-1634-1998) owning direct share holdings of 1,600,000 shares; and this information was given to court by DW1 (Ms Chan Lai Choon the Company Secretary). In her evidence under cross-examination she said 'I am aware that Maju Holdings, the defendants herein had entered into a call and put option agreement with the plaintiffs'. 'That P11 & P12 are the annual reports (the statutory reports) to be made under s 169 of the Companies Act; and such reporting is statutorily required to be made pursuant to KLSE listing requirement. Before these reports are printed, the Board of Ipmuda Bhd will approve the audited accounts ... The final decision on the annual reports — P11 & P12 is given by Mr Loh Siew Choh. The executive Chairman of the Board Tan Sri Dato' Abu Sahid has seen the report before printing'.

To a question by the court whether the Chairman was aware of those statements, Ms Chan answered 'Yes'.

She also confirmed that P11 & P12 the annual reports were also sent to the shareholders of Maju Holdings the defendants herein; and upon her sending-to them no objections from any of the share holders of Maju Holdings were received on the share holdings of Fortune Wealth Hong Kong Ltd of 1,646,000 shares. Not even Tan Sri Abu Sahid raised any objection on the share holdings as shown in P12 p 14, item 15. Further confirming that the statement (in the annual report) is never wrong.

A similar pattern of confirmation on the share holding is noted from the cross-examination of Mr Christopher Chew, DW3. 'This annual report (P11) was approved by the Board of Directors of Ipmuda Bhd before I signed it at p 22 and at p 55 thereof. I confirm that all the information given in the annual report is correct. I agree that under items 15 and 16 shows: Fortune Wealth (Hong Kong) Ltd having a direct share holding of 1,646,000 shares in Ipmuda; and under item 16, Regalion Investment Ltd (the plaintiff in the other suit-consolidated) is shown having direct share holding of 1,600,000 shares in Ipmuda. I agree that this information given there is accurate. When this report was approved by the Board of Directors of Ipmuda Bhd, I was present with Tan Sri Abu Sahid in approving. I agree Tan Sri Abu Sahid has knowledge of this direct share holdings — under items 15 & 16 referred above when he was appointed as the Managing Director for Ipmuda Bhd in April 1997'. This seals the issue of a fact that the defendants had throughout knowledge of the direct/beneficial share holdings of the plaintiffs in Ipmuda Bhd.

[22] We as an appellate court will not readily interfere with the findings of fact arrived by the court of first instance to which the law entrusts the primary task of evaluating the evidence. It is only in cases where we as a Court of Appeal are convinced that there was no judicial appreciation of the evidence adduced at the trial by the trier of fact or that the audio visual advantage reserved to a trial judge had been missed or that the findings made by the trial judge do not accord with the probabilities of the case it would not be open to us to intervene and upset the findings made by the trial judge. The principles of

appellate intervention have been laid down by the Supreme Court in the case of *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1993] 1 MLJ 113 at pp 117–118 in the following terms:

> As regards the principles on which an appellate court may interfere with a lower court's findings of fact we would refer to the following passage in the judgment of Lord Guest in *Tay Kheng Hong v Heap Moh Steamship Co Ltd* in which his Lordship stated as follows:
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> 'There is a heavy onus on a party who seeks to displace the conclusion formed by the trial judge on questions of fact. The principles upon which an appellate court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas v Thomas* [1947] 1 All ER 582 at p 587:
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> "I Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.
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> II The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
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> III The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court." '
>
> Later his Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke v Edinburgh & District Tramways Co Ltd* [1919] SC (HL) 35 at p 37:
>
> 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.'

[23] The judgment under appeal before us does not contain any misdirection or errors warranting our appellate interference. In fact after carefully scrutinising the appeal record and having heard the rival submissions of the parties' counsel we were fully satisfied that the learned judge had properly evaluated the whole body of evidence adduced at the trial and had drawn proper inferences of fact wholly consistent with the contemporary documentary evidence adduced in the case. The learned judge had come to correct findings of fact on the issues before him and had done all that was required of him by law. Hence we found no merits in the appellant's appeals before us.

[24] We had also taken a second hard and careful look at the entire case before us. We are satisfied that the appellant had benefited from the call and

put option agreements entered into with the respondent. In fact the evidence of the appellant's own witness DW3 Mr Christopher SY Chew who was the Managing Director of IPU Sdn Bhd in the Maju Group of Companies had testified under cross-examination as follows (See appeal record bahagian B pp 387-389):

> All the 23,030,000 shares under the call and put option agreements offered by Maju Holdings to the Investors at RM6.50 sen per share were all taken up by the various investors. Eventually all the investors who took up the option under the call and put option agreements paid RM6.50 sen per share.
>
> I confirm that the total transaction price was at RM5.50 sen per share but the total consideration of about RM150,000,000 was worked on the basis of RM6.50 sen per share. The total about RM150m came from the various investors who took up the Ipmuda 23,030,000 shares, under the call and put option.
>
> By this call and put option exercise, Maju Holdings did not have to come up with any money up-front; because Maju Holdings have to purchase the shares from the investors at RM7.55 sen per share at the end of one year. The difference in the price of RM6.50 sen, the offered price; and RM5.50 sen per share the transacted price, was paid to Tan Sri Abu Sahid; who then paid to IGB; as told to me by Tan Sri. I confirm that a sum of RM23,030,000 was paid directly to Tan Sri Abu Sahid. Idon't know whether Tan Sri Abu Sahid paid the sum to IGB.
>
> The official contract notes were at RM5.50 sen per share and I have seen the contract notes for the whole 23,030,000 shares. I have not seen any contract notes or any documentary evidence showing the purchase per share at RM6.50 sen. I know that the sum of RM23,030,000 was paid to Tan Sri Abu Sahid; because I am the one who requested Mr Koh Kim Teck from Seagroat & Campbell to pay directly into Tan Sri Abu Sahid's Account. Now shown encl 28 — pp 72/73. The fax dated 12 May 1997 and 13 May 1997.
>
> Mr David Morais objects to this line of question and to the documents on the ground that whether or not a payment was made to Tan Sri Abu Sahid and for what purpose — are issues irrelevant to the trial and do not arise out of the pleadings or asserted at the O 81 summary procedure.
>
> Court: Objection overruled as the plaintiff is entitled to the tracing of payment being the difference of the RM1 towards the price and the plaintiffs are entitled to cross-examine on the relevant payments made!
>
> Mr Christopher Chew: I agree that this fax was sent by me to Mr Koh Kim Teck of Seagroat & Campbell on 12 May 1997.
>
> This was the second payment payable on the RM23,030,000; because the RM23,030,000 was payable in two instalments. The first instalment in the sum of about RM16m had been paid earlier to Tan Sri and this was a call (Fax) asking for the second payment that was payable. Referred to encl (28) p 73 — the second instalment was for RM7,308,507.50 sen. I confirm that this sum of RM7,308,507.50 sen being the second instalment was paid to Tan Sri Abu Sahid. The funding was successful by call and put option arranged by me and Mr Koh Kim Teck.

[25] It was manifestly clear to us that under the various call and put option agreements the appellant had the benefit of 23,030,000 shares in Ipmuda Bhd worth about RM150,000,000 without having to come up with any money upfront.

Tan Sri Abu Sahid Mohamed also received the payment of RM23,030,000. In these circumstances it will be wholly unjust and unconscionable for the appellant not to honour its obligations to purchase the options shares under the call and put option agreements entered into with the respondents. The parties must honour their commercial bargain entered into.

[26] The trial judge had rightly entered interlocutory judgment in favour of Regalion Investments Ltd, the respondent in Civil Appeal No. W–02–964–2001 and also ordered that the Senior Assistant Registrar or the Deputy Registrar of the High Court to proceed to formally assess the general damages and/or other ancillary relief as prayed for by the respondent. Since interlocutory judgment has been entered the question of liability of the appellant to Regalion Investments Ltd has been conclusively determined with finality and therefore the issue of liability of the appellant cannot be re-opened or reagitated by the appellant during the assessment of damages. The duty of the Senior Assistant Registrar or Deputy Registrar of the High Court is strictly confined to assess the quantum of damages that is payable by the appellant to Regalion Investments Ltd. This is strictly a mathematical exercise involving the of calculation of the total option price of the option shares and deducting the value of the force sold shares, if any.

[27] We had therefore dismissed the above three appeals with costs. We also affirmed the judgments of the learned judge below and the orders made by him.

[28] My learned brothers, Hashim Yusoff and Tengku Baharudin Shah JJCA have read the draft and consented to it.

Appeal dismissed with costs.

Reported by Simerjit Kaur